IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1903.

No. 80.

THE COUNTY OF STANISLAUS ET AL.,
Appellants,

vs.

THE SAN JOAQUIN AND KINGS RIVER CANAL AND IRRIGATION COMPANY,
Appellee.

PETITION FOR REHEARING.

To the Honorable, the Justices of the Supreme Court of the United States:

The appellee in the above entitled cause respectfully suggests the following considerations as to the state of the re-

cord in the cause, which appear to have escaped the attention of the Court, and which, we think, would warrant a rehearing.

In our brief, (pp. 27 to 39,) we contended that, in the case of a canal company *in California,* the proper basis upon which the value of complainant's property should be estimated, in fixing rates, "is the original actual cost of that "property, *if that cost was a fair and necessary one, ex-* "*pended in good faith and without waste or extravagance,* "*—deducting therefrom, if necessary, any depreciation* "*which the property has since undergone, rendering it less* "*fit to subserve the public use.*"

In that argument, we endeavored to show that that position is (*a*) supported by general principles, (*b*) rendered necessary by certain rules of law in California, and (*c*) consistent with the Act of 1885, under which these rates were fixed.

In its opinion, the Court does not advert to the peculiar position of a canal company under the law of California, pointed out by us at pages 31 to 39 of our brief; but places its decision entirely on the ground that the complainant *had not proved* that the original cost of its works was reasonable, proper, and necessary. The Court says:

> "The original cost may have been too great; mistakes of construction, even though honest, may have been made, which necessarily enhanced the cost; more property may have been acquired than necessary or needful for the purpose intended. * * * In this case much of the total amount expended in the course of the construction of the works was not proved by those

who made such expenditures, and the items and total amount of the cost of construction were only proved by the books. What such books did not prove was the reasonableness of that cost, its propriety or necessity. * * * Although these minutes did not conclusively prove the fact of the excessive cost of the work, yet where the books of the company were substantially the *only* evidence of the amount expended *and there was no other satisfactory evidence of the reasonableness of the expenditures,* it would not be surprising if the board should have regarded the statements in the minutes relating to excessive cost as a justification, if not a requirement, for the reduction of the cost of construction, upon which rates might be fixed, by at least the amount mentioned, $350,000."

We submit that, in so holding, the Court was evidently unaware of the fact that, in the court below, the complainant introduced full, detailed, and satisfactory testimony, by certain of the persons who had actually made these expenditures, showing that the original actual cost of that portion of complainant's works now "actually used and useful" in furnishing water in Stanislaus County, was $798,429.61, *and that that cost was a fair, proper, and necessary one, expended in good faith and without waste or extravagance.* That matter was gone into, in the court below, with the utmost fullness and detail, leaving nothing questionable or unexplained.

On taking the present appeal, counsel for appellants filed their assignments of error, which will be found at pages 450 to 454 of the printed transcript; and afterwards filed additional assignments, which will be found at page 458.

In none of these assignments was this question raised, directly or indirectly.

Thereupon, the then solicitor for appellants (since deceased) requested us to enter with him into a stipulation that the portions of the testimony relating to this question need not be printed;—he informing us that he would not, in this Court, dispute the reasonableness and propriety of these expenditures, and that he wished to have the record printed at once, without waiting for proceedings under Rule 10. On these assurances, and this question not being raised by any assignment of error, we assented to the request. That stipulation was accordingly made, and will be found at pages 464-5; and it is there stated:

> "This stipulation is intended to be a substitute for the proceedings provided for by subdivision 9 of rule 10, and to have the same effect as if proceedings under said rule had been taken."

The testimony produced by us on this subject, and so omitted in printing, and which is contained in the original written record filed in this Court, is the following:—

Testimony of	M. L. Stangroom,	page	219.
"	" J. Q. Drummond,	"	286.
"	" C. H. Barrett,	"	291.
"	" A. H. Rose,	"	304.
Complainant's Exhibit	7,	"	960.
"	" 8,	"	971.
"	" 15,	"	989.
"	" 16,	"	999.
"	" 17,	"	1001.

Also complainant's books of account.

Under such circumstances, we submit, the appellants are not entitled to contend in this Court that complainant had not fully proved the reasonableness, propriety, and necessity of the cost of its works.

It is an undoubted principle that he who alleges error, must show it; and, therefore, an appellant is not entitled to ask the reversal of a decree, on the ground of insufficiency of evidence, unless the record on appeal contains, and is affirmatively shown to contain, *all* the evidence on the point attacked.

> *U. S.* v. *Copper Queen etc. Co.*, 185 U. S. 495;
> *City of Providence* v. *Babcock*, 3 Wall. 240, 244;
> *Texas etc. R. Co.* v. *Cox*, 145 U. S. 593, 606;
> *Hansen* v. *Boyd*, 161 U. S. 397, 407.

As was said by the Circuit Court of Appeals for the Ninth Circuit, in *Yates* v. *U. S.*, 90 Fed. 57, 62,

> "The burden of proof to show error is upon the party who asserts it; and to maintain his position he must either present to the appellate court *all* of the evidence, so that the reviewing court can see for itself what the evidence was, or present in his bill of exceptions that portion of the evidence which bears upon the point in controversy, *with a statement that no other evidence was submitted.*"

The cases cited were, it is true, cases at law; but, we submit, the rule must necessarily be the same in equity, for, in either case, the action of the court below is presumed to have been correct.

By subdivision 9 of rule 10 of this Court, it is provided:

> "If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated."

We are not aware that this Court has before had occasion to determine the effect of that rule, in circumstances such as we have stated; but the precise question was decided by the Circuit Court of Appeals for the Eighth Circuit, under a rule exactly similar. In *Lincoln Savings Bank* v. *Allen,* 82 Fed. 148, 149, that court held that, *under that rule,* a failure to *print* all the evidence, was equivalent to a failure to incorporate it at all in the record, and that, under such circumstances, a reversal could not be had for insufficiency of evidence. The court said:

> "The burden of proof to show that there was no evidence to warrant that course is on him who asserts it. If he would maintain his claim, *he* must *present* all the evidence to the appellate court, in order that that court may see for itself what the evidence was. If he fails to do so, he cannot prevail on that issue."

We therefore submit that, as the printed record affirmatively shows that it does not contain all the evidence, and as there is no assignment of error pointing to any insufficiency of evidence in the particular indicated, the appellants were not entitled to be heard as to that question.

These facts were set out at pages 76 to 77 of our brief; but, as counsel for appellants did not advert to this subject on the oral argument, and as we confined ourselves to a reply to what he had then said, it is easy to see that the

condition of the record may have escaped the attention of the Court.

We desire to add that the evidence so omitted in printing, taken in connection with a portion of the testimony of C. Z. Merritt, likewise omitted, fully explained the remarks found in the stockholders' minutes referred to in the opinion of this Court. The facts were that this company, at an early period, had done a large amount of engineering and construction work on a proposed canal from Tulare Lake, on which had been expended very much more than $350,000, and which was never completed or used; and it had also sunk over $100,000 on an experimental farm, which had proved a failure. The charges of extravagance made at those stockholders' meetings, referred solely to the money expended on that Tulare Lake Canal and that farm, *and no part of the money expended upon them was included in the said sum of $798,429.61 shown in complainant's Exhibit 12* (pp. 445-6), *which amount the present works were proved to have actually, reasonably, and necessarily cost.* Whether there was or was not extravagance or waste in those *other* works, we *did* prove that no such thing occurred in these expenditures of $798,429.61.

We may further remark that a transcript of all the proceedings and evidence before the Board of Supervisors was put in evidence in the court below (Exhibits G-1 and G-2); and it showed that the minutes referred to were not produced before that Board, and that the reasonableness, propriety, and necessity of complainant's expenditures were not, in any way, attacked or disputed at that hearing.

Those exhibits, also, were omitted from this record. (P. 457.)

Under these circumstances, we respectfully suggest to your Honors that a re-consideration of this case would advance the ends of justice.

Respectfully submitted,

W. B. TREADWELL,

For Appellee.